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No. 09-190

Supreme Court, U.S.
FILED
JUN 15 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MICHAEL ROBLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the miscarriage of justice exception to the enforcement of appellate waivers was applicable where the district court incorrectly impose the minimum mandatory term of imprisonment despite petitioner's eligibility for safety valve relief.

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FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Michael Robles, respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 17, 2009.

OPINIONS BELOW

On June 29, 2006, a one count Information was filed charging petitioner with Importation of Methamphetamine, in violation of 21 U.S.C. §§ 952, 960. Pursuant to an agreement with the Government, petitioner entered a guilty plea before the Honorable Napoleon A. Jones on August 18, 2006. The plea agreement called for a recommended sentence of 57 months of custody and 5 years of supervised release. Before and during, the sentencing hearing held on March 12, 2007, petitioner maintained that he met all the requirements of safety valve relief pursuant to 18 U.S.C. § 3553(f), and thus was entitled to be sentenced without regard to the minimum mandatory term of 10 years. Specifically, petitioner noted he remained eligible for safety valve relief because he had no more than one criminal history point. At sentencing the Court held that a prior conviction for driving on a suspended license disqualified Mr. Robles for safety valve, notwithstanding the fact that the conviction as noted in the final judgment of the state court, where the conviction was suffered, did not

add any criminal history points. Hence, the petition did not score. Although petitioner had no more than one criminal history point and remained eligible for safety valve relief, the district court sentenced him to a mandatory minimum term of ten years imprisonment, to be followed by five years of supervised release. The Court was of the view that Mr. Robles was not eligible for safety valve and imposed a sentence of 10 years in federal prison and 5 years of supervised release.

Petitioner appealed to the Ninth Circuit. On February 3, 2009, the Ninth Circuit issued an unpublished Memorandum opinion declining to reach the merits of his claim and dismissing his appeal. [*See* Appendix A]. Although petitioner had asserted that the miscarriage of justice exception warranted review of his claim, the Memorandum Opinion did not address this argument, holding instead that petitioner's "appeal is barred by the valid and enforceable waiver of appeal in his plea agreement[.]" [*See* Appendix A]. On March 17, 2009, the Ninth Circuit issued an order denying his petition for rehearing and rehearing *en banc*.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 3742. Review of a sentence

> (a) Appeal by a defendant. A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) [18 U.S.C. § 3563(b)(6) or (b)(11)] than the maximum established in the guideline range; or
>
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

Title 18 U.S.C. § 3553(f). Limitation on applicability of statutory minimums in certain cases.

> Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. §§ 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import

and Export Act (21 U.S.C. §§ 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that –

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act [21 U.S.C. § 848]; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or

> plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

STATEMENT OF THE CASE

On June 29, 2006, a one count Information was filed charging petitioner with Importation of Methamphetamine, in violation of 21 U.S.C. §§ 952, 960. Pursuant to an agreement with the Government, petitioner entered a guilty plea before the Honorable Napoleon A. Jones on August 18, 2006. Before sentencing, petitioner asserted that the court was required to impose sentence without regard to the minimum mandatory term of 10 years because he remained eligible for safety valve relief pursuant to 18 U.S.C. § 3553(f). Petitioner noted that he met all five statutory criteria for relief, including having no more than one criminal history point under the advisory guidelines. He acknowledged that he had one prior misdemeanor conviction on his record for driving without a license. However, since the state court in the prior case had imposed a final sentence of 364 days probation, petitioner noted that the advisory guidelines provided that the offense did not result in

the calculation of any criminal history points.[1] Despite the plain terms of the advisory guidelines, the district court nevertheless held that petitioner was ineligible for safety valve relief based upon the prior misdemeanor conviction. Thus, on March 12, 2007, the court sentenced petitioner to the mandatory minimum term of ten years imprisonment, to be followed by five years of supervised release.

The district court entered the judgment and commitment on March 13, 2007. Petitioner appealed to the Ninth Circuit. On February 3, 2009, the Ninth Circuit issued a Memorandum opinion dismissing the appeal. [*See* Appendix A]. On February 18, 2009, petitioner filed a petition for rehearing and rehearing *en banc*, asserting that the three judge panel had failed to address his argument. Petitioner argued that the appellate waiver did not preclude the appellate court from entertaining the merits of his appeal where the failure to review the erroneous imposition of the minimum mandatory term would result in a miscarriage of justice. On March 17, 2009, the Ninth Circuit issued an order denying the petition. On March 25, 2009, the mandate issued.

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[1] The state court had issued the final sentence, pursuant to a *nunc pro tunc* order, on November 20, 2006. The criminal history provision in effect at the time of petitioner's federal sentencing provided that a prior conviction for driving without a license would not score under the advisory guidelines unless the sentence imposed was at least a year of probation or 30 days custody. *See* United States Sentencing Guidelines Manual § 4A1.2(c)(1) (2006).

This petition for writ of *certiorari* follows.

SUMMARY OF ARGUMENT

A compelling reason for granting a petition for a writ of *certiorari* exists when a federal court of appeals "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or "has decided an important question of federal law that has not been, but should be, settled by this Court[.]" S. Ct. R. 10(a) & (c). As noted below, these grounds are presented by this case.

The Ninth Circuit's Decision

In declining to entertain the merits of petitioner's appeal, the Ninth Circuit's decision sanctions a miscarriage of justice which implicates the fairness, integrity, and public reputation of plea proceedings. The erroneous imposition of a ten year mandatory minimum term represents a sentencing error sufficiently egregious to warrant relief from a purported appellate waiver. Although petitioner acknowledges that appellate waivers are generally enforceable, they should not operate to insulate manifest justice. Indeed, other Circuit courts have recognized that if denying a right of appeal would result in a miscarriage of justice, an appellate court may refuse to honor an otherwise valid appellate waiver. Specifically, the First, Third, Eighth, Tenth and D.C.

Circuits will not enforce an appellate waiver where to do so would preclude any review of an egregious error.

The approach of these Circuits is sound. It also is consistent with the fair administration of justice: "[w]hen all is said and done, such waivers are meant to bring finality to proceedings conducted in the ordinary course, not to leave acquiescent defendants totally exposed to future vagaries (however harsh, unfair, or unforeseeable)."[2] In other words, "[b]y waiving the right to appeal his sentence, the defendant does not agree to accept any defect or error that may be thrust upon him by either an ineffective attorney or an errant sentencing court."[3] Since "such waivers are made before any manifestation of sentencing error emerges, appellate courts *must* remain free to grant relief from them in egregious cases."[4]

Despite the sound position taken by many of its sister Circuits, however, the Ninth Circuit here declined to address petitioner's argument that it should not enforce the appellate waiver where to do so would result in manifest injustice. In refusing to address the miscarriage of justice exception and invoking the appellate waiver to dismiss the appeal, the Ninth Circuit's decision endorses expediency at

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[2] *United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001).

[3] *United States v. Guillen*, 561 F.3d 527, 529 (D.C. Cir. 2009).

[4] *Teeter*, 257 F.3d at 25 (emphasis added).

the expense of the fair administration of justice. Its inflexible enforcement of an appellate waiver to preclude review of a harsh, unfair and erroneous minimum mandatory sentence is inconsistent with the approach adopted by many of its sister Circuits.

Thus, petitioner urges this Court to grant review to resolve the conflict and to establish that reviewing courts may entertain the merits of an appeal notwithstanding an otherwise valid waiver where the denial of such review would result in a miscarriage of justice.

ARGUMENT

I.

This Court Should Endorse a "Miscarriage of Justice Exception" to the Enforcement of Appellate Waivers; Such an Exception Promotes Fairness and Integrity in the Plea Process Without Eliminating the Government's Benefit of a Bargain or Unduly Burdening the Efficient Administration of Justice.

A criminal defendant's right to appeal from a federal conviction and sentence is statutory in nature.[5] Although "[a]s a general rule, a defendant is

[5] *See* 18 U.S.C. § 3742; 28 U.S.C. § 1291; *McKane v. Durston*, 153 U.S. 684, 687 (1894) (Constitution does not guarantee a right to direct appeal).

allowed to waive appellate rights" in a plea bargain with the government, various federal appellate courts have nevertheless "imposed limits on the use of these waivers"[6] and "declin[ed] to adopt a blanket rule prohibiting all review of certain otherwise valid waivers of appeals."[7] In short, "no circuit has held that these contractual waivers are enforceable on a basis that is unlimited and unexamined."[8]

Rather, various federal appellate courts, including the Third Circuit, have recognized that "[t]here may be an unusual circumstance where an error amounting to a miscarriage of justice may invalidate the [appellate] waiver."[9] The First Circuit has explicitly held that appellate waivers contained in plea agreements "are subject to a general exception under which the court of appeals retains inherent power to relieve the defendant of the waiver, albeit on terms that are just to the government, where a miscarriage of justice occurs."[10] In adopting this rule, the First Circuit recognized "that the term 'miscarriage of justice' is more a concept than a constant."[11]

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[6] *United States v. Andis*, 333 F.3d 886, 891-92 (8th Cir. 2003).

[7] *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001).

[8] *United States. v. Ready*, 82 F.3d 551, 555 (2d Cir. 1996).

[9] *Khattak*, 273 F.3d at 562; *see Andis*, 333 F.3d at 891-92; *see also United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004).

[10] *Tweeter*, 257 F.3d at 25-26.

[11] *Id.* at 26.

Since "[r]elief from waivers has traditionally occurred on a fact-specific basis," the Court declined to adopt a "rigid taxonomy" delineating specific situations in which such an exception would apply.[12] Nevertheless, the First Circuit recognized that "some of the [relevant] considerations" in determining whether to relieve a defendant from a waiver "come readily to mind: the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result."[13] These factors, however, are not exclusive: "[o]ther considerations doubtless will suggest themselves in specific cases."[14]

Although the exception articulated by the First Circuit is "open ended," the appellate court nevertheless emphasized that it did not necessarily eliminate the government's benefit of the bargain. As the appellate court noted, "[m]otions to dismiss will still be entertained and, by appealing after promising not to do so, defendants will risk giving the government an option to disclaim a plea agreement, if it wishes to do so."[15] Moreover, the "general reservation" to an otherwise valid appellate waiver would be "applied

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[12] *Id.*

[13] *Id.*; *see also Khattak*, 273 F.3d at 563 (adopting the *Tweeter* factors).

[14] *Id.*

[15] *Id.*

sparingly and without undue generosity."[16] Thus, as the First Circuit noted, such an exception "is sufficiently broad to capture any truly deserving case but demanding enough to prevent defendants who have agreed to waive their right to appeal from successfully pursuing garden-variety claims of error."[17]

The "general reservation" adopted by the First Circuit and recognized by many sister Circuits preserves the right of a defendant to a fair sentencing determination without necessarily sacrificing the government's interest in finality. Such an exception encourages all parties to vigilantly guard against material and manifestly unjust sentencing errors. It also affords a reviewing court discretion to rectify an egregious error. In short, the exception ensures that "the defendant waives his right to contest only a sentence within the statutory range and imposed under fair procedures; his waiver relieves neither his attorney nor the district court of their obligations to satisfy applicable constitutional requirements."[18] In sum, a rule which does not permit extreme errors to be insulated from further review is consistent with the fair administration of justice and preserves the integrity of the entire system, including the plea negotiation process.

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[16] *Id.*

[17] *Id.*

[18] *Guillen*, 561 F.3d at 530.

For example, an appellate waiver should not be enforced "if the sentencing court's failure in some material way to follow a prescribed sentencing procedure results in a miscarriage of justice."[19] The erroneous imposition of a minimum mandatory term represents a material disregard of a prescribed sentencing procedure. Indeed, application of safety valve relief pursuant to 18 U.S.C. § 3553(f) is not discretionary; the statute directs sentencing courts to impose sentence without regard for the minimum mandatory term where a defendant meets all five statutory criteria.[20] Where the erroneous denial of relief under the safety valve statute results in a sentence twice as severe as what would otherwise be

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[19] *Id.* at 531 (noting that where "the district court utterly fails to advert to the [sentencing] factors in 18 U.S.C. § 3553(a), then [a reviewing court] may disregard the waiver and consider the defendant's argument that the district court imposed an unlawful sentence.").

[20] *See, e.g., United States v. Quirante*, 486 F.3d 1273, 1275-76 (11th Cir. 2007) (" . . . [W]hen the requirements of § 3553(f) are met, if a defendant has an advisory guidelines range lower than an otherwise applicable mandatory minimum, he must be given the benefit of the guidelines range in arriving at the advice that the guidelines furnish for the sentencing decision"); *United States v. Cardenas-Juarez*, 469 F.3d 1331, 1335 (9th Cir. 2006) ("The statutory safety valve of 18 U.S.C. § 3553(f) survives the Supreme Court's holding in [*United States v. Booker*, 543 U.S. 220 (2005)], and district courts must continue, in accordance with congressional intent, to apply its relief from mandatory minimums in appropriate cases"); *United States v. Duran*, 383 F. Supp. 2d 1345 (D. Utah 2005) (" . . . [O]nce the safety valve provision is satisfied, the court must look to the advisory Guidelines in determining the appropriate sentence.").

recommended in the plea bargain, a sentencing court's failure to properly apply the law cannot be deemed anything less than a miscarriage of justice.

Petitioner's case presents such a scenario. Based upon a straightforward application of the statutory criteria, including the criminal history provision, petitioner remained eligible for safety valve relief and was entitled to a joint recommendation of 57 months custody. The clarity and gravity of the sentencing court's error and petitioner's vigorous objections below warranted appellate consideration of the miscarriage of justice exception. In failing to even address the exception, however, the Memorandum decision conflicts with the position adopted by its sister Circuits. The decision also presents a compelling federal question for review: this Court should recognize the flexibility of appellate courts to examine and invalidate purported appellate waivers where the denial of the right to appeal would work a miscarriage of justice.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the Ninth Circuit's judgment.

Respectfully submitted,

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Dated: August 11, 2009

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL ROBLES, Defendant-Appellant.	No. 07-50126 D.C. No. CR-06-01459-J MEMORANDUM* (Filed Feb. 3, 2009)

Appeal from the United States District Court
for the Southern District of California
Napoleon A. Jones, District Judge, Presiding

Submitted January 13, 2009**
Pasadena, California

Before: TROTT, KLEINFELD and IKUTA, Circuit Judges.

The plain language of the appeal waiver in Robles's plea agreement forecloses his argument that the district court erred in calculating his criminal history category, and thus erred in determining that Robles was ineligible for the "safety valve" under 18 U.S.C. § 3553(f). Therefore, we dismiss this appeal.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

"Plea agreements are contractual by nature and are measured by contract law standards." *United States v. Franco-Lopez,* 312 F.3d 984, 989 (9th Cir. 2002). The plain language of Robles's plea agreement precluded an appeal "unless the Court imposes a custodial sentence greater than the high end of the guideline range (or statutory mandatory minimum term, if applicable) recommended by the Government pursuant to this agreement at the time of sentencing." After calculating Robles's criminal history category and determining that he was ineligible for safety valve relief, the district court sentenced Robles to the mandatory minimum. The district court did not impose a custodial sentence greater than the applicable mandatory minimum. Under the terms of the plea agreement, Robles has waived the right to appeal his sentence. *See United States v. Torres,* 999 F.2d 376, 378 (9th Cir. 1993) (per curiam); *United States v. Bolinger,* 940 F.2d 478, 480 (9th Cir. 1991).

Contrary to Robles's arguments, the plea agreement did not give Robles the right to appeal his sentence if the district court miscalculated his criminal history category. Robles "was reminded at every turn," *Torres,* 999 F.2d at 378, that his eligibility for the safety valve, as well as his criminal history category, were uncertain, but the agreement did not include the right to appeal the district court's calculation of criminal history category. Therefore, Robles waived the right to appeal the district court's

determination that he was not eligible for application of the safety valve.

Nor did the district court impose an illegal sentence which would relieve Robles from the waiver. A sentence is illegal if it "is not authorized by the judgment of conviction, or in excess of the permissible statutory penalty for the crime, or in violation of the constitution." *United States v. Fowler,* 794 F.2d 1446, 1449 (9th Cir. 1986) (internal quotation marks and citations omitted); *see also United States v. Vences,* 169 F.3d 611, 613 (9th Cir. 1999). Robles's 120-month sentence was authorized by his judgment of conviction and is far below the statutory maximum listed in 21 U.S.C. § 960(b)(1), which is life imprisonment. *See United States v. Littlefield,* 105 F.3d 527, 528 (9th Cir. 1997) (per curiam) ("[Defendant] was given the minimum sentence permitted by the statute of conviction. . . . Such a sentence is neither illegal, nor Guidelines-based." (internal citations and quotation marks omitted)); *United States v. Baramdyka,* 95 F.3d 840, 843-44 (9th Cir. 1996) ("[B]ecause the sentence imposed was well within the statutory maximum, it is not illegal and therefore, [the illegal sentence] exception is unavailable.").

Because Robles's appeal is barred by the valid and enforceable waiver of appeal in his plea agreement, we need not address the parties' other arguments.

DISMISSED.

[24] THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF, VERSUS MICHAEL ROBLES, DEFENDANT.	NO. 96-CR-1459-J HEARING PROBATION REPORT AND SENTENCE SAN DIEGO, CALIFORNIA MARCH 12, 2007, 8:38 A.M.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS ON APPEAL

BEFORE THE
HONORABLE NAPOLEON A. JONES, JR.,
WITHOUT A JURY

[25] *SAN DIEGO, CALIFORNIA,*
MONDAY, MARCH 12, 2007, 8:38 A.M.

(PRIOR UNRELATED PROCEEDINGS.)

THE CLERK: CALLING NUMBER 3 ON THE CALENDAR, CASE NUMBER 06-CR-1459, UNITED STATES V. MICHAEL ROBLES, ON FOR PROBATION REPORT AND SENTENCING.

MR. VALENCIA: GOOD MORNING, YOUR HONOR. GUADALUPE VALENCIA ON BEHALF OF MR. ROBLES, WHO IS IN CUSTODY.

THE COURT: GOOD MORNING, MR. VALENCIA.

MS. MC CALL: GOOD MORNING, YOUR HONOR. CHRISTINA MC CALL FOR THE UNITED STATES, APPEARING FOR REBECCA KANTER.

THE COURT: THANK YOU, MS. MC CALL.

MR. VALENCIA: MR. ROBLES IS PRESENT BEFORE THE COURT. WE ARE PREPARED TO PROCEED WITH SENTENCING.

THE COURT: DO YOU DESIRE ALLOCUTION AGAIN, SIR?

MR. VALENCIA: YES, YOUR HONOR.

THE COURT: MR. ROBLES APPEARS BEFORE THE COURT FOR PURPOSES OF PROBATION HEARING AND SENTENCING, HAVING PLED GUILTY TO IMPORTATION OF METHAMPHETAMINE.

THE RECORD SHOULD REFLECT THE COURT HAS RECEIVED AND CONSIDERED THE PROBATION OFFICER'S REPORT, GOVERNMENT'S SENTENCING SUMMARY CHART, DEFENDANT'S DEPARTURE REQUEST AND SENTENCING MEMORANDUM, GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S DEPARTURE REQUEST. THOSE DOCUMENTS ARE A PART OF THE RECORD IN THIS CASE.

THE MOTION THAT WAS INITIALLY HEARD BY THE COURT WITH [26] REFERENCE TO WHETHER OR NOT A NUNC PRO TUNC ORDER

WOULD MAKE MR. ROBLES SAFETY-VALVE ELIGIBLE. THE COURT RULED THAT IT WOULD NOT, AND THIS MATTER WAS CONTINUED TO SEE WHETHER OR NOT MR. ROBLES WAS OTHERWISE ELIGIBLE, I BELIEVE, FOR SAFETY VALVE.

IS THAT CORRECT, COUNSEL?

MR. VALENCIA: THAT IS CORRECT, YOUR HONOR.

YOUR HONOR, WITH REGARDS TO THAT, WE CONTINUE TO BELIEVE THAT MR. ROBLES DOES QUALIFY FOR SAFETY VALVE. I KNOW THAT YOUR HONOR AND THE GOVERNMENT HAS TAKEN A CONTRARY POSITION. OUR REQUEST, YOUR HONOR, IS THAT HIS SENTENCE – THAT YOUR HONOR GRANT THE REQUESTED DEPARTURES AND THAT, BASED ON THE 3553(A) FACTORS, THAT HE BE SENTENCED TO 30 MONTHS IN CUSTODY.

MR. ROBLES IS A YOUNG MAN. HE IS 26 YEARS OF AGE. HE IS A UNITED STATES CITIZEN. HE WAS BORN IN LOS ANGELES. HE GREW UP IN A REALLY TOUGH NEIGHBORHOOD IN COMPTON, CALIFORNIA. FORTUNATELY FOR MR. ROBLES, HE WAS ABLE TO STAY AWAY FROM TROUBLE.

HE HAD SOME LAW ENFORCEMENT CONTACTS AS A YOUTH. THEY WERE NOTHING VERY SERIOUS. I DISCUSSED HIS GROWING UP

AND HIS BACKGROUND WITH HIM, AND I THINK THAT ONE OF THE MOST IMPORTANT THINGS FOR HIM, AND ONE OF THE THINGS THAT I HAVE WITNESSED MYSELF, IS THAT HE HAS AN EXTREMELY SUPPORTIVE FAMILY. THEY HAVE BEEN AT EVERY ONE OF HIS COURT APPEARANCES. [27] THEY HAVE BEEN IN CONTINUAL CONTACT WITH ME THROUGHOUT THESE PROCEEDINGS AND ACTIVE IN THE ENTIRE PROCESS IN THIS CASE.

UNFORTUNATELY, THEY ARE NOT HERE TODAY. HIS OTHER FRIENDS AND FAMILY ARE HERE, SITTING IN THE FRONT ROW OF THE COURTROOM TODAY. THEY INFORM ME THAT THE PARENTS RAN INTO TRAFFIC AND ARE ON THE WAY HERE BUT ARE NOT HERE AT THIS TIME.

ONE OF THE OTHER ISSUES THAT I WANTED TO ADDRESS TO THE COURT IS WE ARE ALSO REQUESTING THAT YOUR HONOR RECOMMEND THE 500-HOUR DRUG PROGRAM, BASED ON SOME OF THE FACTORS THAT ARE CITED IN THE PROBATION REPORT, PAGE 6 OF THE PROBATION OFFICER'S REPORT.

UNFORTUNATELY, MR. ROBLES HAD FRIENDS THAT HE HUNG OUT WITH, AND THEY WERE INVOLVED IN THE USE OF DRUGS, AND MR. ROBLES MADE POOR JUDGEMENTS AT TIMES, AND HE ALSO GOT INVOLVED. ACCORDING TO THE PROBATION REPORT, HE

REGULARLY USED MARIJUANA AND ALSO, ON A WEEKLY BASIS, USED COCAINE.

I HAVE DISCUSSED THIS WITH HIM, AND HE FEELS THAT IT WOULD BE HELPFUL TO DO THE DRUG PROGRAM. HE THINKS THAT THERE IS ONLY GAIN TO BE SOUGHT, AND HE IS REALLY MOTIVATED IN TAKING THE PROGRAM.

THE COURT: I THINK IT WOULD BE HELPFUL. HE IS REALLY YOUNG. HE IS 26 YEARS OLD. HE HAS NEVER HAD ANY TYPE OF DRUG INTERVENTION. I THINK THAT THIS PROGRAM WOULD HELP MR. ROBLES.

MR. VALENCIA: SO THAT'S ONE OF OUR RECOMMENDATIONS. [28] THE OTHER RECOMMENDATION IS THAT HE BE HOUSED IN A PRISON AS CLOSE TO SOUTHERN CALIFORNIA AS POSSIBLE SO THAT HE COULD RECEIVE VISITS FROM HIS FAMILY.

I THINK IT WOULD BE HELPFUL THAT THESE TWO THINGS COULD HELP IN HIS REHABILITATION.

BASED ON THAT, WE SUBMIT, BASED ON EVERYTHING IN THE RECORD.

THE COURT: BEFORE I HEAR FROM MR. ROBLES, LET ME INQUIRE OF PROBATION WHETHER OR NOT THERE IS ANYTHING ADDITIONAL THEY WOULD LIKE TO ADD.

PROBATION OFFICER RYAN: NO ADDITIONAL COMMENTS ON BEHALF OF PROBATION.

THE COURT: STATE YOUR NAME, SIR.

MR. RYAN: MARK RYAN ON BEHALF OF PROBATION.

THE COURT: THANK YOU, SIR.

MR. ROBLES, DID YOU HAVE COMMENT?

THE DEFENDANT: I WOULD LIKE TO APOLOGIZE TO THE UNITED STATES AND TO THE AMERICAN PEOPLE. I WOULD LIKE TO APOLOGIZE TO MY FAMILY. IT'S AN EMBARRASSING MOMENT IN MY LIFE. I WOULD LIKE TO THROW MYSELF, ON YOUR MERCY, YOUR HONOR.

THAT WOULD BE ALL.

THE COURT: THANK YOU.

DOES THE GOVERNMENT HAVE COMMENT?

MS. MC CALL: WE DO BELIEVE THAT MR. ROBLES' THREE CRIMINAL HISTORY POINTS MAKE HIM INELIGIBLE FOR A DEPARTURE [29] ANYWHERE BELOW THE 21 MANDATORY MINIMUM FOR THE LOAD OF METHAMPHETAMINE.

IN THIS COURT, AND THE RECENT DECISION BEFORE THE NINTH CIRCUIT, *RAMON*

CHAN-ASTORGA, IN IDENTICAL CIRCUMSTANCES THE NINTH CIRCUIT UPHELD THIS COURT'S DECISION TO IMPOSE THE MANDATORY MINIMUM, SIMILAR CIRCUMSTANCES INVOLVING A NUNC PRO TUNC ORDER RETROACTIVELY TERMINATING PROBATION.

WITH RESPECT TO THE 500-HOUR DRUG TREATMENT PROGRAM, I NOTE THAT MR. ROBLES REFUSED TO DISCUSS ANY SORT OF SUBSTANCE ABUSE ISSUES ON THE ADVICE OF HIS ATTORNEY, AND THE ONLY THING THAT WE HAVE IN THE RECORD IS SOMETHING FROM THE WESTERN REGIONAL DETENTION FACILITY BUT NOTHING IN THE P.S.R. AND NOTHING AT THE TIME OF ARREST THAT WOULD INDICATE THAT HE HAS AN ONGOING DRUG PROBLEM.

THE COURT: THE RECORD WILL REFLECT THAT THE COURT, HAVING HEARD THE COMMENTS OF COUNSEL AND THOSE OF MR. ROBLES WITH REFERENCE TO THE ADVISORY GUIDELINES, WOULD MAKE THE FOLLOWING FINDINGS:

THE BASE OFFENSE LEVEL IS 34. THERE IS A 2-LEVEL DOWNWARD ADJUSTMENT BECAUSE MR. ROBLES PLAYED A MINOR ROLE, GIVING AN ADJUSTED OFFENSE LEVEL OF 32. THE GOVERNMENT HAS MADE A MOTION PURSUANT TO 3(E)(1.1)(B), BASED ON TIMELY

ACCEPTANCE OF RESPONSIBILITY, GIVING A TOTAL OFFENSE LEVEL OF 29.

THERE IS A CRIMINAL HISTORY SCORE OF 3, PLACING [30] MR. ROBLES IN A CRIMINAL HISTORY CATEGORY 2. BASED ON THE FACT THAT MR. ROBLES HAS MORE THAN ONE CRIMINAL HISTORY POINT, HE IS SUBJECT TO THE MINIMUM MANDATORY SENTENCE OF 120 MONTHS IN CUSTODY.

THE RECORD SHOULD REFLECT THAT THE COURT, BASED UPON NINTH CIRCUIT PRECEDENT, BELIEVES THAT IT HAS NO DISCRETION, ONCE THERE IS MORE THAN ONE CRIMINAL HISTORY POINT, TO IMPOSE THE MINIMUM MANDATORY SENTENCE.

IT IS THEN THE ORDER OF THE COURT THAT MR. ROBLES BE INCARCERATED FOR A TERM OF 120 MONTHS, BE PLACED ON SUPERVISED RELEASE FOR A PERIOD OF FIVE YEARS; ABIDE BY THE STANDARD AND MANDATORY CONDITIONS OF SUPERVISION WITH THE FOLLOWING SPECIALLY CONDITIONS:

NOT POSSESS FIREARMS, EXPLOSIVE DEVICES, OR OTHER DANGEROUS WEAPONS;

PARTICIPATE IN A PROGRAM OF DRUG AND/OR ALCOHOL ABUSE TREATMENT, INCLUDING DRUG TESTING AND COUNSELING, AS DIRECTED BY PROBATION.

MR. ROBLES, YOU MAY BE REQUIRED TO CONTRIBUTE TO THE COST OF SERVICES RENDERED IN AN AMOUNT TO BE DETERMINED BY PROBATION, BASED UPON YOUR ABILITY TO PAY. IF IN FACT, THERE IS A DISAGREEMENT AS TO THAT ABILITY, YOU HAVE THE RIGHT TO BRING IT INTO COURT SO THAT THE COURT CAN MAKE A DETERMINATION AS TO WHETHER OR NOT THERE IS THAT ABILITY.

SUBMIT TO A SEARCH OF YOUR PERSON, PROPERTY, [31] RESIDENCE, ABODE, OR VEHICLE, AT A REASONABLE TIME AND IN A REASONABLE MANNER, AS DIRECTED BY PROBATION;

REPORT ALL VEHICLES OWNED OR OPERATED OR IN WHICH YOU HAVE AN INTEREST TO PROBATION;

THAT YOU NOT ENTER OR RESIDE IN THE REPUBLIC OF MEXICO;

RESOLVE ALL OUTSTANDING WARRANTS WITHIN 60 DAYS.

THE COURT WILL MAKE A FIND THAT THERE IS AN INABILITY TO PAY A FINE. THERE WILL BE A $100 SPECIAL ASSESSMENT.

THE COURT WILL RECOMMEND THAT, IF OTHERWISE ELIGIBLE, MR. ROBLES BE ALLOWED TO PARTICIPATE IN THE BUREAU OF PRISONS' 500-HOUR DRUG TREATMENT PROGRAM.

TO THE EXTENT THAT THE COURT BELIEVES THAT VISITATION WITH FAMILY CAN ONLY AID IN REHABILITATION, I WILL RECOMMEND THAT MR. ROBLES, IF AT ALL POSSIBLE, BE PLACED IN A FACILITY THAT WILL ALLOW VISITATION WITH HIS FAMILY MEMBERS, NOTING THAT THE FAMILY IS LOCATED IN THE SOUTHERN DISTRICT OF CALIFORNIA.

COUNSEL, IS THERE ANYTHING ADDITIONAL?

MR. VALENCIA: NOTHING FURTHER, YOUR HONOR.

THE ONLY THING WE WANT TO MAKE SURE IS THAT HE BE ADVISED OF HIS APPELLATE RIGHTS.

THE COURT: I AM GOING TO DO THAT, SIR.

MS. MC CALL: IT IS OUR POSITION THAT HE HAS WAIVED THEM.

[32] THE COURT: THAT IS CERTAINLY SOMETHING THAT THE NINTH CIRCUIT CAN TAKE UP.

MR. ROBLES, I WOULD ADVISE YOU THAT, IF YOU DESIRE TO APPEAL, YOU MUST FILE THAT NOTICE WITHIN 10 DAYS OF TODAY'S DATE. IT HAS TO BE FILED WITH THE CLERK

OF THIS COURT, NOT IN THE COURT OF APPEAL, NOT IN THIS COURTROOM.

DO YOU UNDERSTAND THAT, SIR?

THE DEFENDANT: YES, SIR.

MR. VALENCIA: FOR THE RECORD, YOUR HONOR, IT'S OUR POSITION THAT HE HAS NOT WAIVED HIS RIGHT TO APPEAL.

THE COURT: I ASSUMED THAT ONCE YOU TOLD ME THAT I NEEDED TO ADVISE HIM, SIR.

MR. VALENCIA: THANK YOU, YOUR HONOR.

(END OF PROCEEDINGS.)

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CERTIFICATION

I hereby certify that I am a duly appointed, qualified and acting official court reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause on August 18, 2006, and February 12 and March 12, 2007; that said transcript is a true and correct transcription of my stenographic notes; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

Dated April ___, 2007, at San Diego, California.

D. JOAN RING, OFFL. RPTR.

[16] THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT
OF CALIFORNIA

UNITED STATES OF AMERICA,	NO. 96-CR-1459-J
PLAINTIFF,	CONTINUANCE
VERSUS	SAN DIEGO, CALIFORNIA
MICHAEL ROBLES,	FEBRUARY 12, 2007, 8:44 A.M.
DEFENDANT.	

REPORTER'S TRANSCRIPT
OF PROCEEDINGS ON APPEAL

BEFORE THE
HONORABLE NAPOLEON A. JONES, JR.,
WITHOUT A JURY

[17] *SAN DIEGO, CALIFORNIA, MONDAY, FEBRUARY 12, 2007, 8:44 A.M.*

(PRIOR UNRELATED PROCEEDINGS.)

THE CLERK: CALLING MATTER NUMBER 5 ON THE CALENDAR, CASE NUMBER 06-CR-1459, UNITED STATES V. MICHAEL ROBLES, ON FOR SENTENCE WITH PROBATION OFFICER'S REPORT.

MR. VALENCIA: GOOD MORNING, YOUR HONOR. GUADALUPE VALENCIA ON BEHALF OF MR. ROBLES, WHO IS IN CUSTODY.

THE COURT: GOOD MORNING, MR. VALENCIA.

MS. KANTER: GOOD MORNING, YOUR HONOR. REBECCA KANTER FOR THE UNITED STATES.

THE COURT: THANK YOU, MS. KANTER.

MR. VALENCIA: YOUR HONOR, MR. ROBLES IS PRESENT BEFORE THE COURT.

WHAT WE WOULD LIKE TO DO THIS MORNING IS BOTH WE AND THE GOVERNMENT FILED MOTIONS WITH REGARDS TO THE ISSUE OF WHETHER MR. ROBLES QUALIFIES FOR SAFETY VALVE. WE BELIEVE THAT HE QUALIFIES FOR SAFETY VALVE, BASED ON THE ARGUMENT IN MY PAPERS, AND THEY BELIEVE THAT HE DOESN'T. SO WE HAVEN'T HAD A SAFETY VALVE MEETING FOR THAT REASON.

WHAT WE WOULD LIKE TO DO IS, WITH THE COURT'S PERMISSION, TO GET A RULING ON THAT ISSUE AS TO WHETHER HE DOES OR DOESN'T QUALIFY FOR SAFETY VALVE. IF YOUR HONOR RULES IN OUR FAVOR, WE WOULD LIKE TO SET UP A SAFETY VALVE MEETING AND DEAL WITH THAT ISSUE.

THE DIFFERENCE IN THE SENTENCE IS APPROXIMATELY FIVE [18] OR SIX YEARS' DIFFERENCE IN WHETHER HE QUALIFIES OR DOESN'T QUALIFY FOR SAFETY VALVE.

IN THE ALTERNATIVE, THE GOVERNMENT HAS EXPRESSED ANOTHER OPTION TO US THAT WE HAVE TO CONSIDER ALSO.

BOTH PARTIES FEEL THAT IT WOULD BE IMPORTANT TO DETERMINE WHETHER MR. ROBLES QUALIFIES OR DOESN'T QUALIFY FOR SAFETY VALVE. I HAVE FILED A BRIEF, AND I WOULD LIKE TO MAKE SOME COMMENTS ON THAT.

THE COURT: CERTAINLY. I WOULD INDICATE THAT I AM SURPRISED THAT YOU ARE NOT AWARE OF THE RULING THIS COURT MADE WITH REFERENCE TO A SIMILAR CASE THAT THIS COURT MADE.

MR. VALENCIA: I TALKED TO A COUPLE LAWYERS, AND THEY INDICATED TO ME THAT, IN THE PREVIOUS CASE, YOUR HONOR RULED AGAINST THE NUNC PRO TUNC, BUT I NEVER GOT TO SEE THE BRIEFING, SO I DON'T KNOW WHAT ARGUMENTS WERE MADE AND WHAT CASES WERE CITED IN THE PREVIOUS CASE. THAT'S THE REASON I FILED THESE MOTIONS; AND WE NEEDED TO GET A RULING ON IT.

THE COURT: CERTAINLY. YOU CAN MAKE YOUR ARGUMENT.

MR. VALENCIA: YOUR HONOR, THE GOVERNMENT'S POSITION IS THAT THE EIGHTH CIRCUIT CONTROLS, *MARTINEZ-CORTEZ*. IN

THAT CASE, THE FACTS ARE SIMILAR TO THE FACTS HERE, BUT I DON'T BELIEVE THAT THE *MARTINEZ-CORTEZ* CASE CONTROLS. IT'S NOT A NINTH CIRCUIT CASE, AND I DON'T THINK THAT ITS REASONING IS CORRECT EITHER.

IN FACT, THE DISSENTING JUDGE IN THE *MARTINEZ* CASE [19] CITES THE *GUTHRIE* CASE OF THE NINTH CIRCUIT IN THEIR REASON FOR BELIEVING THAT THE NUNC PRO TUNC ISSUE IS SOMETHING THAT THE FEDERAL COURTS MUST ABIDE BY.

I THINK THAT THE CLOSEST CASE TO THE NUNC PRO TUNC ISSUE IS THE *GUTHRIE* CASE. I THINK WHAT THE NUNC PRO TUNC STATE COURT RULE DOES IS IT ACTUALLY CREATES THAT SENTENCE AS THOUGH THAT WERE THE ORIGINAL SENTENCE. SO I THINK THAT THE FEDERAL COURTS HAVE TO LOOK AT WHAT THE SENTENCE WAS.

I THINK THAT A NUNC PRO TUNC IS SIMILAR TO VACATING A SENTENCE, AND I THINK THAT THERE IS A DISTINCTION BETWEEN THE NUNC PRO TUNC AND WHAT OCCURRED IN THE *HIDING* CASE. I THINK 1204 SET ASIDE A CONVICTION AND DISMISSED IT. THE STATE LAW IS CLEAR ON THAT ISSUE. IT SAYS THAT, EVEN THOUGH IT'S DISMISSED UNDER THAT STATUTE, IT CAN STILL BE USED AS A PRIOR OFFENSE, AND IT CAN STILL BE USED AT A DATE FOR SENTENCING.

I DON'T THINK THAT A NUNC PRO TUNC DOES THAT. I THINK THAT A NUNC PRO TUNC IS LIKE VACATING A SENTENCE BECAUSE THAT'S WHAT THE COURT DID IN THIS CASE. IT VACATED THE SENTENCE OF 365 DAYS TO A TWO-YEAR PROBATIONARY PERIOD TO 364 DAYS.

THE COURT: WELL, THEY CERTAINLY DID THAT. I GUESS THE QUESTION THE COURT WOULD HAVE FOR YOU, MR. VALENCIA, IS THE BASIS OR THE REASON FOR THE VACATING OF SENTENCE.

MR. VALENCIA: WELL, ON THAT ISSUE, YOUR HONOR, *GUTHRIE* SAYS THAT THE REASONING BEHIND WHY A STATE COURT [20] VACATES A SENTENCE IS NOT AN ISSUE; AND THAT'S WHAT THE DISSENT SAYS IN *CORTEZ-MARTINEZ,* THAT WE SHOULDN'T LOOK TO THE REASONING, THAT WE HAVE TO ACCEPT WHAT THE STATE COURT DID.

IT'S CLEAR THAT THE STATE COURT DID IT IN THIS CASE, AND IT'S DONE IT IN MANY OTHER CASES BECAUSE OF THE CONSEQUENCES THAT A PERSON MAY FACE IN A FEDERAL SENTENCE, BUT THE *GUTHRIE* CASE, IN BOTH THE DISSENT AND *MARTINEZ* CASE, SAID THAT WE SHOULDN'T LOOK TO THAT, THAT WE SHOULDN'T SECOND-GUESS WHAT A STATE COURT DOES.

STATE COURT SENTENCES ARE FINE WHEN THEY ARE MADE OR WHEN A NUNC PRO TUNC TYPE ISSUE OCCURS, BUT-SO THAT'S MY ANSWER TO THAT QUESTION, YOUR HONOR.

IT'S LIKE WHEN SOMEBODY COLLATERALLY ATTACKS A SENTENCE LATER. EVEN AFTER THEY ARE SENTENCED, THE FEDERAL COURTS CAN'T LOOK AS TO WHY IT WAS VACATED, ONLY THE FACT THAT IT WAS VACATED. THAT WAS ONE OF THE ARGUMENTS IN *U.S. V. GUTHRIE* ALSO. THE COURT IN *GUTHRIE* SAID, "LOOK, IT WOULD BE ODD FOR US TO HAVE TO CONSIDER A SENTENCE WHEN THE STATE COURT HAS ALREADY VACATED IT." IN THEIR EYES, IT'S ALREADY CHANGED. IT WOULD BE ODD FOR A FEDERAL COURT TO SECOND-GUESS THAT.

BASED ON MY BRIEFING, I SUBMIT. I KNOW THE GOVERNMENT'S POSITION IS CONTRARY, BUT THIS ISSUE HAS NOT SQUARELY BEEN BEFORE THE NINTH CIRCUIT. I BELIEVE THAT *GUTHRIE* IS AS CLOSE AS WE CAN GET TO IT.

THE COURT: THANK YOU, SIR.

[21] MS. KANTER.

MS. KANTER: THANK YOU, YOUR HONOR.

THE GOVERNMENT BELIEVES THAT THIS COURT'S RULING IN *UNITED STATES V. FRANCISCO NAVARRO* LAST YEAR WAS THE

CORRECT ONE, WHICH IS TO FOLLOW THE MARTINEZ-CORTEZ CASE FROM THE EIGHTH CIRCUIT.

THE GOVERNMENT DISAGREES WITH THE DEFENSE COUNSEL'S INTERPRETATION OF THE *GUTHRIE* CASE. WE READ *GUTHRIE* AS SAYING THAT THE FEDERAL COURT HAS A RIGHT TO INTERPRET PRIOR CONVICTIONS UNDER THE FEDERAL GUIDELINES AND THAT PRINCIPLES SUCH AS FULL FAITH AND CREDIT DON'T APPLY WHEN THE COURT IS TRYING TO ASCERTAIN WHAT THE IMPACT OF STATE COURT CONVICTION IS ON THE FEDERAL SENTENCE.

IN THIS CASE, THE GOVERNMENT ACTUALLY ACQUIRED COPIES OF THE TRANSCRIPT FROM THE HEARING THAT WAS HELD TO GET THE NUNC PRO TUNC ORDER FROM STATE COURT IN THIS CASE; AND I HAVE COPIES IF THE COURT WOULD LIKE.

IT'S QUITE CLEAR FROM THE TRANSCRIPT IN THIS CASE THAT, AS COUNSEL CONCEDED, IT WAS ACHIEVED FOR THE SOLE PURPOSE OF BEING ABLE TO ENABLE THE DEFENDANT TO QUALIFY FOR SAFETY VALVE RELIEF. IT WAS NOT BASED ON A LEGAL ERROR AND THEREFORE SHOULD STILL BE APPLICABLE IN DETERMINING THE DEFENDANT'S CRIMINAL HISTORY AND GUIDELINES.

THE COURT: YOU WANT TO FILE THAT WITH THE COURT?

MS. KANTER: YES. THANK YOU, YOUR HONOR.

[22] (PAUSE.)

THE COURT: MR. VALENCIA, ANYTHING ADDITIONAL?

MR. VALENCIA: ONLY THAT *GUTHRIE* DOES SAY THAT, IN THAT CASE, THE PERSON HAD A 1973 CONVICTION. THEY COLLATERALLY ATTACKED IT, AND IT WAS VACATED, AND THE COURT, IN *GUTHRIE,* SAID, "WE DON'T LOOK TO THE REASON FOR WHY IT WAS VACATED." IN FACT, THE STATE COURT NEVER INDICATED WHY THEY VACATED IT, AND THEN LATER IT WAS DISMISSED.

WE ONLY LOOK TO THE FACT THAT IT WAS VACATED, AND SO THAT'S WHAT *GUTHRIE* SAYS.

AND I SUBMIT IT BASED ON THAT.

THE COURT: IN LOOKING AT THE TRANSCRIPT JUST TENDERED, IT'S CLEAR THAT THE SOLE REASON FOR THE NUNC PRO TUNC ORDER WAS TO CIRCUMVENT, IF YOU WILL, THE SENTENCING MANDATES OF THE FEDERAL COURT WITH REFERENCE TO THE MANDATORY MINIMUM IF, IN FACT, THERE IS MORE THAN ONE CRIMINAL HISTORY POINT.

LOOKING AT PAGE 2, LINES 16 THROUGH 19, I AM QUOTING FROM THE TRANSCRIPT (READING):

> HE CAN ONLY BREAK THROUGH THAT 10-YEAR MINIMUM MANDATORY IF HE ONLY HAS ONE CRIMINAL CASE. IF THE COURT REDUCES THE TERM OF PROBATION TO 364 DAYS, THEN THAT CONVICTION WOULDN'T SCORE.

IT'S CLEAR THAT THE SOLE REASON FOR THIS NUNC PRO TUNC ORDER WAS TO CIRCUMVENT THE FEDERAL SENTENCING [23] GUIDELINES. THE COURT WOULD AGREE WITH THE EIGHTH CIRCUIT THAT THAT DOES NOT IN FACT RENDER THAT SENTENCE A NULLITY.

MR. ROBLES WOULD STILL BE SUBJECT TO THE MINIMUM MANDATORY SENTENCE IN THAT HE HAS MORE THAN ONE CRIMINAL HISTORY POINT, AND THAT WOULD BE THE RULING OF THE COURT, SIR.

MR. VALENCIA: YOUR HONOR, BASED ON THAT, WE WOULD ASK – AND I SPOKE WITH THE A.U.S.A. ON THIS CASE. WE WOULD ASK FOR A CONTINUANCE OF APPROXIMATELY THREE TO FOUR WEEKS. THERE IS ANOTHER ISSUE THAT WE MAY BE PURSUING THAT MAY AFFECT THE MINIMUM MANDATORY. WE WOULD ASK FOR A CONTINUANCE.

THE COURT: MS. KANTER?

MS. KANTER: THAT'S FINE. NO OBJECTION.

THE COURT: MR. ROBLES, DO YOU UNDERSTAND THE OBJECTION THAT'S BEING MADE?

THE DEFENDANT: CONTINUANCE.

THE COURT: IS THAT OKAY WITH YOU?

THE DEFENDANT: YES, SIR.

THE COURT: THE RECORD WILL REFLECT, GOOD CAUSE HAVING BEEN STATED, THIS MATTER WILL BE CONTINUED APPROXIMATELY THREE TO FOUR WEEKS.

THE CLERK: TO MONDAY, MARCH 12, 2007, AT 8:15.

THE COURT: THAT WILL BE THE ORDER.

MR. VALENCIA: THANK YOU.

MS. KANTER: THANK YOU, YOUR HONOR.

(OTHER UNRELATED PROCEEDINGS.)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL ROBLES, Defendant-Appellant.	No. 07-50126 D.C. No. CR-06-01459-J Southern District of California, San Diego ORDER (Filed Mar. 17, 2009)

Before: TROTT, KLEINFELD, and IKUTA, Circuit Judges.

The panel has voted to deny Appellant's Petition for Rehearing. Judge Trott has recommended denying Appellant's Petition for Rehearing En Banc, and Judges Kleinfeld and Ikuta have voted to deny the en banc petition

The full court has been advised of the Petition for Rehearing En Banc and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing and the Petition for Rehearing En Banc are DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL ROBLES, Defendant-Appellant.	No. 07-50126 D.C. No. CR-06-01459-J Southern District of California, San Diego **MANDATE** (Filed Mar. 25, 2009)

The judgment of this Court, entered 02/03/2009, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

/s/
By: Theresa Benitez
Deputy Clerk